FILED BY CLERK
SEP -5 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROBERT MICHAEL HOLLENBACK, Petitioner.	2 CA-CR 2008-0063-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20030930

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Robert Hollenback was charged with molestation of a child, J.; sexual conduct with a minor under the age of fifteen, Z.; and luring a minor for sexual

exploitation. The facts that gave rise to the charges against Hollenback and resulted in his convictions after a jury trial are set forth briefly in our decision on appeal. *See State v. Hollenback*, 212 Ariz. 12, ¶ 2, 126 P.3d 159, 161 (App. 2005). On appeal, this court affirmed his convictions and sentences. *Id*. In this petition for review, Hollenback challenges the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he asserted, *inter alia*, that counsel had been ineffective in failing to object to hearsay testimony and failing to request a jury instruction on the lesser included offense of attempted child molestation. Absent an abuse of discretion, we will not disturb that ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In his petition for post-conviction relief, Hollenback raised numerous issues, but we address only those claims of ineffective assistance of trial counsel that he raises on review. A defendant is only entitled to relief on a claim of ineffective assistance of counsel if he establishes counsel's performance was both deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have been different. *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984). A defendant's failure to satisfy either element of this test is fatal to the claim for relief. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶3 Hollenback first contends, as he did below, that trial counsel was ineffective for failing to raise a hearsay objection at trial when the state elicited testimony from Tucson police detective Joel Mann about statements J. had made to him before trial during an interview that was videotaped. Tucson police officer Warren Wright had also interviewed J. shortly after the offenses were reported. That interview was not recorded. During trial, defense counsel objected to Wright's testifying about statements J. had made before trial, anticipating J. might not provide consistent testimony at trial. The trial court sustained that objection.

¶4 When J. testified, he denied Hollenback had him sit on Hollenback's lap and denied telling the detective otherwise; he denied Hollenback had "touched [him] in a way that [he] didn't like"; and he denied Hollenback had touched his "private part" and denied telling the detective he had. But J. said "yes" when the prosecutor asked whether he had told the officer Hollenback had "tried to touch you on your private parts" and whether Hollenback had, in fact, tried to touch his private parts. J. subsequently denied Hollenback had actually touched his private parts or his clothes. When the court asked if the prosecutor intended to present any impeachment evidence, she responded that she intended to call Mann to testify.

¶5 Mann subsequently testified that he had interviewed J. at the Children's Advocacy Center and that, initially, J. had told him Hollenback had tried to touch him, pointing to his groin area. He stated J. had then told him Hollenback had touched the area of his groin "over the clothes." Mann also testified J. had demonstrated with his own hand

how Hollenback had touched him, making a squeezing motion. Counsel did not object to any of this testimony. Hollenback contends this impeachment evidence was the only substantive evidence of the offense on count one, admitted solely as the result of counsel's failure to reiterate the previously asserted hearsay objection.

¶6 In denying relief on this claim, the trial court summarized the salient portions of J.'s and Mann's testimony. The court stated:

> At the videotaped interview, J[.] had demonstrated the squeezing to Sgt. Mann with his own hand. Arizona Rule of Evidence 801(d) classifies this prior inconsistent statement of J[.] as non-hearsay and permits its use as substantive evidence unless its use unduly prejudices the defendant. There is no undue prejudice under the facts of this case: J[.] did not deny that he had talked to Sgt. Mann; the interview was videotaped; Sgt. Mann did not have an interest in the proceeding; there was no reason to question the reliability of Sgt. Mann; there was other evidence of guilt as explained above; and the testimony was offered only after J[.] testified and for the purpose of impeachment.

¶7 On review, Hollenback concedes the court was correct that Rule 801(d)(1)(A), Ariz. R. Evid., generally permits a party to impeach the party's own witness with prior inconsistent statements. But he insists the court erred when it determined "the evidence was admissible under Rule 801(d)(1)(A) and was not unfairly prejudicial under Rule 403, [Ariz. R. Evid.]." Hollenback asserts the court "did not squarely address the fact that J[.]'s out-of-court statements were also the only evidence of Defendant's guilt on Count One of the indictment." (Emphasis omitted.) He argues that, because of counsel's failure to object, the state was improperly permitted to introduce impeachment evidence as the only evidence of the offense, which he claims is prohibited by cases such as *State v. Allen*, 157 Ariz. 165,

755 P.2d 1153 (1988); *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986); *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982); and *State v. Cruz*, 128 Ariz. 538, 627 P.2d 689 (1981).

¶8 "We presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling." *State v. Moody*, 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004). Moreover, the portion of the trial court's minute entry where it resolved this issue and portions of its order addressing other, similar claims demonstrate the court was aware of and considered the appropriate factors in determining whether it would have permitted the testimony if counsel had objected. The court clearly applied the test set forth in *Allred*.[1] *See also State v. Miller*, 187 Ariz. 254, 257-58, 928 P.2d 678, 681-82 (App. 1996). As the court correctly noted, a witness's prior inconsistent statement is not hearsay, *see* Rule

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[1]The factors articulated in *Allred* are:

> 1) the witness being impeached denies making the impeaching statement, and
>
> 2) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or
>
> 3) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, . . .
>
> 4) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness,
>
> 5) the impeachment testimony is the only evidence of guilt.

134 Ariz. at 277, 655 P.2d at 1329.

801(d)(1)(A), and it may be introduced as substantive evidence of an offense when the witness testifies at trial and is subject to cross-examination. *See State v. Skinner*, 110 Ariz. 135, 141-42, 515 P.2d 880, 886-87 (1973); *State v. Sucharew*, 205 Ariz. 16, ¶ 20, 66 P.3d 59, 66 (App. 2003).[2] Although that general rule of admissibility is subject to limitations, the court considered those limitations here.

¶9 We note as the trial court also found, that Mann's testimony about the prior statement was not the only substantive evidence of the offense. Z.'s testimony provided, at the very least, circumstantial evidence to support the conviction; at best, it was direct, albeit equivocal, evidence. Z. testified that Hollenback had perpetrated sexual acts on him; that he had seen J. on Hollenback's lap and on his bed; and that he thought he saw Hollenback touching J., noting J. had looked "stunned" when Z. saw him afterward. Thus, the court would not have abused its discretion by overruling an objection, had counsel made one. *See Sucharew*, 205 Ariz. 16, ¶¶ 19, 23, 66 P.3d at 66-67 (reviewing for abuse of discretion trial court's admission as impeachment evidence of witness's prior inconsistent statement that also provided substantive evidence of offense). Therefore, counsel's performance was not deficient, nor was it prejudicial.

¶10 Hollenback also maintains the trial court abused its discretion by rejecting his contention that trial counsel had been ineffective when he failed to request an instruction

[2]Significantly, the trial court sustained the hearsay objection made when Wright testified. But as defense counsel correctly pointed out when he argued at that time, J. had not yet testified. Counsel added, "I object to any of his statements coming in until we know he's actually going to testify."

on the lesser included offense of attempted child molestation. "Actions of defense counsel which appear to be trial tactics will not support an allegation of ineffective assistance of counsel." *State v. Webb*, 164 Ariz. 348, 351, 793 P.2d 105, 108 (App. 1990). The trial court believed counsel's decision not to request the instruction was likely a reasonable tactical decision based on the asserted defense that nothing had occurred at all. Hollenback has not sustained his burden of establishing the trial court abused its discretion in denying relief on this claim.

¶11 The petition for review is granted. But, for the reasons stated herein, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge